Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	MM Docket No. 92-259
Act of 1992	)	
	)	
Broadcast Signal Carriage Issues	)	

To: The Commission

REPLY COMMENTS OF A.C. NIELSEN COMPANY

A.C. Nielsen Company ("Nielsen"), by its attorneys, hereby submits Reply Comments in the above-referenced proceeding as requested by the Commission in its Notice of Proposed Rule Making, FCC 92-499 (released November 19, 1992) (the "Notice").

1. In its Comments filed in this proceeding on January 4, 1993, Nielsen urged the Commission to consider the impact of the proposed "must-carry" and "retransmission consent" rules on rating organizations such as Nielsen, and to adopt regulations:

(i) Requiring cable systems to retransmit, without degradation, program source identification ("SID") codes that are embedded in either the "active" lines or vertical blanking interval ("VBI") of commercial and noncommercial broadcast programming carried by cable systems, regardless of whether that carriage is pursuant to "must-carry" obligations or "retransmission consents"; and

(ii) Requiring cable systems to provide Nielsen with at least thirty (30) days' notice prior to deleting or repositioning a broadcast station's programming on the system's line-up, again whether the carriage of

affected programs is pursuant to "must-carry" obligations or "retransmission consents."

Relatively few parties filed comments which addressed the specific points raised in Nielsen's Comments, and Nielsen's Reply Comments herein are intended to respond to those Comments.

I. VBI CARRIAGE REQUIREMENTS

2. "Program-Related." With regard to the issue of when cable systems should be required to carry "program-related" material transmitted on a station's VBI, four parties argued for limiting potential must-carry obligations in a way that might relieve cable systems from carrying SID codes that are implanted in the VBI of carried signals.[1/] For example, Adelphia Communications Corp. ("Adelphia"), Tele-Communications, Inc. ("TCI") and Time Warner Entertainment Company, L.P. ("Time Warner") each argued that "program-related" material which must be carried by systems (if "technically-feasible") be defined in the same manner as "related images" were defined for the purposes of identifying material that receives copyright protection. WGN Continental Broadcasting v. United Video, 693 F2d. 622, 51 R.R.2d 1617 (7th Cir. 1982) ("WGN"), Adelphia Comments at p. 16; TCI Comments at p. 19; Time Warner Comments at p. 24. If defined in that manner, only VBI material that is, inter alia, "intended to be seen by the same viewers ... during the same interval of time" as the

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1/ No party filing Comments questioned the obligation of cable systems to carry SID codes that are implanted in the "active" or "primary video" portion of broadcast stations' transmissions. See Nielsen's Comments at 6-7.

main-channel programming would have to be carried by cable systems pursuant to must-carry obligations. WGN, 693 F2d at 626, 51 R.R.2d at 1621.

3. Additionally, Adelphia argued that noncommercial educational stations' VBI programming be subject to compulsory carriage only when "necessary for the receipt of programming by handicapped persons or for educational or language purposes." Adelphia Comments at p. 16. TKR Cable Company ("TKR") went so far as to suggest that cable companies should not be required under any circumstances to carry the VBI programming of carried broadcast stations, even if such material was "program-related" or transmitted to allow the receipt of main-channel programming by handicapped persons or for educational or language purposes, if the cable operator does not use the VBI for its own purposes.[2/] TKR Comments at pp. 9-10.

4. To the extent that the adoption of these or other suggestions would allow cable systems to strip SID codes transmitted by Nielsen over the VBI, Nielsen strongly objects to their adoption and requests the Commission reject all such proposals.

5. For example, the Commission must reject the suggestion that it adopt the same test to determine when programming is sufficiently "related" so as to be entitled to common must-carry protection as was adopted in WGN to determine when "images" were sufficiently "related" so as to be entitled to common copyright protection.[3/] As

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2/ Other Comments, such as those filed by America's Public Television Stations ("APTS"), addressed this topic in a manner that would not appear to be inconsistent with Nielsen's suggestions, and Nielsen is therefore not responding to such proposals.

3/ The Commission did not suggest that the exact same test apply, but merely requested comment on whether it would be appropriate to adopt a test in the must-carry context that is "parallel" to the test set forth in WGN.

interpreted by the Adelphia, TCI and Time Warner, such a test would require VBI programming, before being subject to must-carry protection, to be "intended to be seen" by viewers "during the same interval of time" as they are watching the main channel programming. See Adelphia Comments at p. 16; TCI Comments at p. 19; Time Warner Comments at p. 24. Applying a literal interpretation of the WGN test might allow cable systems' to strip SID codes because -- pursuant to the Commission's directive[4/] -- Nielsen's VBI and Line 22 AMOL/SID Codes are not intended to be (and therefore are not) seen by viewers. Such a result would be inconsistent with Congress' aim to protect the integrity of ratings, an important support of our free broadcast system. Cable Television Consumer Protection and Competition Act of 1992, §2(a)(12) ("Cable Act").

6. As correctly noted by the National Association of Broadcasters (the "NAB"):

> nothing in the legislative history of the Cable Act suggests that Congress contemplated use of a copyright concept to determine what portions of a must-carry signal must be retransmitted. While examining copyright treatment of related concepts may be useful to the Commission, whether any particular matter might be deemed a "related image" for copyright purposes should not control the Commission's determination of whether it is related to the primary audio and visual portions of a must-carry signal.

NAB Comments at p.22, n.26. The difference in the Copyright Act's (Copyright Act of 1976, 17 USC Section 101 et. seq.) and Cable Act's objectives is evident by the very terms used in the respective statutes. Whereas, for this purpose, the Copyright Act

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4/ Letter from Roy J. Stewart, Chief Mass Media Bureau, Federal Communications Commission, to Grier C. Raclin, Esq., counsel to A.C. Nielsen Company (November 22, 1989).

protects only "images" which are related to copyright-protected programming, the Cable Act protects all "material" that is related to protected programming, with no explicit or implicit requirement of visibility. Cable Act at §614(b)(3). There is no support found in the Cable Act or its legislative history to support imposing the "visibility" requirement suggested by Adelphia, TCI and Time Warner. In fact, such a requirement might very well undercut the integrity of ratings, a result which would clearly be contrary to Congress' stated goal of protecting the viability of the free broadcast system.

7. Applying the even more restrictive tests suggested by Adelphia (to require the carriage only of material "necessary for the receipt of programming by handicapped persons or for educational or language purposes") could be even more detrimental to the integrity of ratings. Nothing in the legislative history of the Cable Act supports such a restrictive reading of the statute's requirement and such a reading would fly in the face of the provisions designed specifically to ensure the integrity of ratings. See, e.g., Cable Act at §614(b)(3). At the very least, if the Commission decides to accept some form of the proposal to use the WGN test, it should include an explicit requirement on all cable systems to carry Nielsen's AMOL/SID codes and related material imbedded in the active or VBI portion of programming that is carried by the systems, whether that programming is carried pursuant to "must-carry" obligations, voluntary "retransmission consents" granted by local broadcast stations, or otherwise.

8. "Technical Feasibility." TKR's effort to achieve a similar end by suggesting that retransmission be deemed "technically infeasible" whenever the systems are not using the VBI is also unwarranted and unwise. TKR effectively requests the Commission to subject "program-related" material to the same "discretionary" carriage requirements as apply to non-program-related material (See Cable Act at §614(b)(3)), so

long as the cable companies "exercise" their discretion by not using the VBI for other purposes. Such a proposal ignores the differentiation that the Cable Act imposes between program-related VBI programming, which cable systems are required to carry whenever "technically feasible," and "other material" that may be carried at the discretion of the cable operator. Id. It is specifically contrary to Congress' intent to require carriage of program-related material even when cable operators would prefer not to do so, regardless of how that preference is manifested.

9. As to when carriage might in fact be deemed "technically feasible," Nielsen again posits that cable systems be required to carry program-related material -- including SID codes -- whenever that carriage can be accomplished without materially affecting the systems' technical operations, requiring substantial changes to the system's infrastructure, or requiring significant investment by the system operator. Nielsen's Comments at 8. While such a provision would require cable carriage even when minor changes to the system's infrastructure or insubstantial investment by the system operator were necessary (and would apply even where the VBI was not otherwise being used by the cable operator), Nielsen suggests that it would properly balance Congress', Nielsen's and the public's interest in maintaining the integrity of ratings with cable operators' interests in not being required to bear unfair burdens to meet the Cable Act's carriage requirements.

II. CHANNEL REPOSITIONING OR DELETION

10. In response to the issue of channel repositioning or deletion, the National Cable Television Association ("NCTA") and TCI argued that cable systems should not be prohibited from deleting or re-positioning broadcast station programming other than during the four "sweep" periods identified in the Commission's Notice. NCTA

Comments at p. 24; TCI Comments at p.25; Notice at ¶37, n. 47. Nielsen does not disagree with these suggestions so long as Nielsen is provided the same notice of such changes as the system's are required to provide to the affected broadcast stations.[5/]

11. In the Cable Act, Congress recognized that to allow a cable system to delete or reposition a broadcast station's programming on the system's line-ups during periods the station is subject to ratings analysis might greatly undermine the integrity of the "ratings" of that station. Congress therefore prohibited such line-up changes during those quarterly sweeps periods. Cable Act at §615(b)(9). For those stations subject to year-round ratings, a logical extension of this prohibition would be to disallow systems from deleting or repositioning the signals of such stations at any time during the year.

12. Nevertheless, Nielsen recognized in its Comments, as argued by NCTA and TCI, that such a prohibition would substantially infringe upon cable systems' interests in being able to reposition or delete broadcast stations' programming in order to meet viewer and market demands. For this reason, and while a year-round prohibition on channel repositioning or deletions for stations subject to year-round ratings would be entirely consistent with the Cable Act's provisions, Nielsen suggested that repositionings and deletions outside of the four quarterly Sweep periods identified year-to-year by Nielsen be allowed so long as systems are required to give thirty (30) days' notice of such

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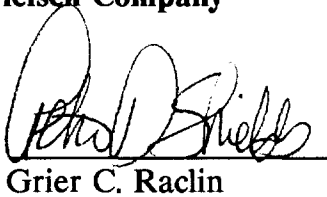
5/ TCI suggested in its Comments that systems be allowed to delete or reposition programming "at the beginning" of the Sweep periods even if they were barred from doing so "during" the Sweep period. TCI Comments at note 29. Nielsen is at a loss to comprehend this suggestion, as it would appear internally inconsistent to suggest that systems be allowed to make changes "at the beginning" of a period "during" which they are barred from making such changes. To the extent TCI is requesting the opportunity to make changes during one of the four Sweep periods, at the "beginning" of that period or otherwise, Nielsen opposes the request as being inconsistent with the clear terms of Section 614(b)(9) of the Cable Act.

changes to Nielsen and other recognized ratings companies. See Nielsen Comments at 18. Because cable companies are already required to provide notice of system line-up changes to affected stations, requiring the operators to provide the same notice to Nielsen would not impose a significant burden on them. It would recognize the systems' interest in maintaining control over their line-ups while at the same time serving Congress,' Nielsen's and the viewing public's interest in maintaining the integrity of ratings. For these reasons, Nielsen urges the Commission to adopt Nielsen's proposed notice requirement.

For the foregoing reasons, Nielsen respectfully requests the Commission to adopt the limited SID code carriage and notice requirements set forth in Nielsen's Comments and herein.

Respectfully submitted,

A.C. Nielsen Company

By: 

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